

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MARTIN POLANSKI,

Defendant-Appellant.

UNPUBLISHED

February 26, 1999

No. 198479

Recorder's Court

LC No. 94-012867

Before: Cavanagh, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

Defendant was charged with felonious assault, MCL 750.82; MSA 28.277, and unlawfully driving away an automobile, MCL 750.413; MSA 28.645. Following a jury trial, defendant was convicted of unlawfully driving away an automobile. The trial court sentenced defendant to a term of eighteen months' to five years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in allowing him to dismiss his counsel and present his own closing argument. In gauging whether a defendant should be allowed to dismiss his counsel and proceed pro se, the trial court must determine (1) that the defendant's request is unequivocal; (2) whether the defendant is asserting his right knowingly, intelligently, and voluntarily; and (3) that granting the defendant's request will not disrupt, unduly inconvenience, and burden the court. *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994) (Griffin, J.), quoting *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). Pursuant to MCR 6.005(D), before allowing a defendant to represent himself, a court must first (1) advise the defendant of the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risk involved in self-representation, and (2) offer the defendant the opportunity to consult with a lawyer. Trial courts are required to substantially comply with the requirements set forth in *Anderson* and MCR 6.005(D). *People v Adkins (After Remand)*, 452 Mich 702, 726; 551 NW2d 108 (1996).

In the present case, defendant was represented by counsel from the start of trial through the testimony of the last witness. Defendant then told the court that he wished to present his own closing argument.

After carefully reviewing the record, we conclude that the trial court did not err in allowing defendant to present his own closing argument. Defendant clearly and unequivocally stated his desire to represent himself. The trial court discussed the hazards of self-representation and warned defendant that the closing argument would have to be based on the evidence presented at trial. The trial court required defense counsel to serve as standby counsel. The fact that the trial court did not specifically address the charged offenses and the range of possible punishment is not enough to defeat a finding of substantial compliance with the waiver procedures. See *id.* at 731.

Defendant also claims that it was error for the trial court to fail to have him reevaluated when he made his request for self-representation. At the least, defendant maintains, statements made by defendant during his closing argument should have raised a bona fide concern regarding his competency. A criminal defendant is presumed competent to stand trial absent a showing that he is incapable of understanding the nature and object of the proceedings against him or of assisting his defense in a rational manner. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). The determination of a defendant's competence is within the trial court's discretion; however, the trial court has the duty of raising the issue of incompetence where facts are brought to its attention which raise a bona fide doubt as to the defendant's competence. *Id.*

Here, defense counsel formally requested a competency evaluation after the trial court granted defendant's request to present his own closing argument. The trial court denied the request because defendant had been examined as recently as five or six weeks before trial, none of the experts had found defendant to be mentally incompetent, it had seen nothing during the course of trial that raised a concern regarding defendant's competency, and it believed that defendant was using the issue of his competency for tactical purposes. We find no abuse of discretion. None of the experts testified that defendant was mentally incompetent. With regard to the trial court's conclusion that defendant was feigning mental illness, even Dr. Johnson, the expert whose testimony was most favorable to defendant, conceded that it was possible that he was faking. Moreover, the trial court had the opportunity to observe defendant during three days of trial and saw nothing that caused it to doubt defendant's competency. On this record, we find no error requiring reversal.

II

Defendant next asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first argues that his trial counsel was ineffective for failing to have defendant examined to determine whether defendant was competent to waive the insanity defense. Defendant relies on Dr. Johnson's testimony at the *Ginther*¹ hearing, where she stated that it "would have been helpful" if defendant had been evaluated to determine whether defendant was competent to waive the insanity defense.

We conclude that defendant has not demonstrated that his trial counsel was ineffective. Counsel testified that he considered diminished capacity to be a viable defense. While Dr. Johnson stated that it would have been useful if defendant had been examined in order to assess his motivation for refusing the insanity defense and choosing to present his own closing argument, she testified that she had believed diminished capacity to be the more appropriate defense. Furthermore, the other two experts who testified concluded that defendant had the ability to form specific intent at the time of the incident. On this record, we cannot find that defense counsel's failure to have defendant evaluated to determine whether he was competent to waive the insanity defense was below an objective standard of reasonableness under prevailing professional norms. See *Pickens, supra*. The fact that the diminished capacity defense did not work does not establish ineffective assistance of counsel. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Moreover, considering the testimony of all three experts, we cannot say that the presentation of an insanity defense would have resulted in a different outcome at trial. See *Pickens, supra*.

Defendant also maintains that counsel was ineffective for failing to investigate witnesses who could have testified as to defendant's physical condition immediately preceding the incident. However, the failure to interview witnesses does not constitute inadequate preparation unless the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Defendant has not established that counsel's failure to interview the staffs at Detroit Receiving Hospital and Harper Hospital or the security guards defendant reported encountering led to ignorance of valuable evidence that would have substantially benefited defendant. Defendant merely speculates that the former witnesses could have testified as to how defendant's physical condition affected his psychological problems, and the latter witnesses could have testified that defendant was not under the influence of alcohol or controlled substances. Accordingly, defendant has not established that he was prejudiced by counsel's alleged deficiency. See *Pickens, supra*.

III

Defendant next raises several issues regarding the presentence report. First, defendant complains, with justification, that the trial court did not respond to his challenge to the characterization of his conduct as assaultive. Furthermore, when defendant raised the issue again at the posttrial hearing, the trial court erroneously stated that defendant had waived the issue by failing to object at sentencing.

A defendant has a due process right to the use of accurate information at sentencing. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1992). In general, when a trial court fails to resolve a challenge to the information contained in the presentence report, the case is remanded to the trial court for clarification whether the disputed information played a role in its sentencing decision. If it

did, the defendant is resentenced and the trial court must resolve the challenge. If it is determined that the disputed matter played no part in the sentencing decision, defendant's sentence is affirmed and the trial court need only strike the disputed matter from the presentence report. *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992). However, where the asserted inaccuracies would have no determinative effect upon the sentence, the failure of a court to respond may be considered harmless error. *Daniels, supra*.

In the present case, we find that the trial court's failure to respond was harmless because the presentence report's characterization of defendant's conduct is not inaccurate. The undisputed evidence presented at trial established that defendant struck Foster with the van, knocking him to the ground and injuring him. This clearly qualifies as an assault. See *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998); *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). The fact that defendant was acquitted of the felonious assault charge is not dispositive; where there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the court at sentencing. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995).

Defendant also argues that he is entitled to a new presentence report because the trial court drew a line through incorrect information and wrote in the correct information. Defendant contends that this action was inadequate and he is entitled to have a new report, without the incorrect information, sent to the Department of Corrections. MCL 771.14(5); MSA 28.1144(5) provides that if the court finds on the record that the challenged information is inaccurate, "the presentence investigation report shall be amended, and the inaccurate . . . information shall be stricken accordingly before the report is transmitted to the department of corrections." There does not appear to be any law regarding what constitutes adequately "striking" erroneous information from the presentence report.

Because defendant failed to provide this Court with a copy of the amended presentence investigation report containing the complained-of change, we conclude that defendant has waived this issue. See MCR 7.212(C)(6); cf. *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995). In any case, defendant has cited no authority for the proposition that an entirely new presentence report must be submitted to the Department of Corrections, rather than an amended presentence report with the errors clearly corrected. Given that Random House Webster's College Dictionary defines "strike" in part as "to cancel; cross out," the trial court's action of crossing out the incorrect conviction and writing in the actual conviction comported with MCL 771.14(5); MSA 28.1144(5).

IV

Finally, defendant argues that he is entitled to a new trial because of prosecutorial misconduct during the prosecutor's rebuttal to defendant's closing argument. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998).

We agree that the prosecutor's statement that defendant had "conned" to get his Social Security disability benefits was neither based on the evidence nor on a logical inference from the evidence. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The fact that defendant went to see a doctor for the purpose of getting disability benefits does not establish that he was faking his disability. Nevertheless, defendant was not denied a fair and impartial trial by this single, isolated remark. Defense counsel's objection was sustained, and the trial court instructed the jury to disregard the comment. The trial court's action was sufficient to cure the error.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald E. Holbrook, Jr.

/s/ William C. Whitbeck

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).